

Environmental Law as an Academic Subject

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It is the purpose of this article to endeavour to define the contents of this seemingly new subject and to suggest how it might be presented as a course for a law degree, at either undergraduate or postgraduate level, in Universities and Polytechnic Law Schools in this country (with suitable adaptations for Scotland).

Environmental law sounds new and it is certainly new in a Law School syllabus sense, but in reality it is as old as the common law itself. The mediaeval statutes that prohibited the planting of trees within 100 feet of the King's highway were designed to protect the passerby from the arrows of Robin Hood and his men as they passed through Sherwood Forest. William Shakespeare's father was fined in 1584 by the town council of Stratford for allowing a dung-heap to accumulate outside his house. James I had passed an ordinance against the burning of "sea coal" within a specified distance of his Palace at Westminster.

So we must start with the common law, and that means primarily the law of nuisance. Smoke that may injure a potential plaintiff's health – or that of the begonias in his garden – may be made the subject of an injunction or give rise to an action for damages. Sundry noises, smell and smuts from a petrol depot that disturbed the peace at the plaintiff's home were the subject of successful nuisance proceedings in *Halsey v. Esso Petroleum Co. Ltd.*¹

The common law is perhaps most zealous in its protection of the property rights vested in private owners. Thus the water in the adjacent river or stream must not be polluted by the agency of some other person higher up the stream and the plaintiff is entitled to a flow of water passing his land in its natural state, unaffected by colour, smell, quality, or temperature, and undiminished in quantity: *Young v. Bankier Distillery Co.*,² But this does not apply to underground percolating water not flowing in a defined channel: *Bradford v. Pickles*.³

Air and water quality, freedom from unreasonable noise and objectionable substances placed on adjoining land, are therefore assured by the common law to the owner or occupier of land. He is entitled to peaceful enjoyment of his property

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1. [1961] 1 All E.R. 145.

2. [1897] A.C. 691.

3. [1895] A.C. 587.

uninterrupted by the unreasonable use of his neighbour's land: *sic utere tuo ut alienum non laedas*. Also, if a particular nuisance is so serious as to affect a substantial number of Her Majesty's subjects in a particular locality, the Attorney-General may intervene and take proceedings for an injunction to prevent further commission of such a public nuisance: *Att.-Gen. v. P.Y.A. Quarries Ltd.*⁴

But the common law as it has developed has not concerned itself with the rights of the community as such. Proceedings in nuisance will depend on the initiative of a land owner or occupier and will be subject to the accidents of litigation, and in particular on the resources and energy of an individual plaintiff.

The cholera epidemic and appalling squalor of town life in Victorian times made it vitally necessary for Parliament to intervene and the great Public Health Acts of 1848 and 1875 were the result. Duties were placed on local authorities to provide adequate sewerage systems and the concept of statutory nuisance (now to be found in section 92 of the Public Health Act 1936) has proved to be of great practical benefit.

In the twentieth century laws affecting the environment have blossomed apace. By far the most important has been the town and country planning legislation under which the right to develop land has been nationalised. Under the Town and Country Planning Act 1947 and its successors a land-owner may not, subject to certain detailed exceptions, carry out development on his land without first obtaining permission from the local planning authority. For this purpose "development" means not only the carrying out of building and other operations but also the making of a material change in the use of his land (from which, however, agricultural operations are excepted). This seminal legislation, sensitively used, is potentially of the greatest importance as an advance guard to protect and conserve the environment.

However, since the end of the Second World War, Parliament has passed three major measures in the fight to preserve the environment and curb pollution. These are: the Clean Air Act 1956, supplemented by the Act of the same name of 1968, the Control of Pollution Act 1974, and the Wildlife and Countryside Act 1981. These three Acts utilise in different ways four separate but linked mechanisms. These are absolute or qualified prohibitions of specified activities enforced by the criminal law, a licensing system again buttressed by enforcement provisions in default of compliance, special areas within which a particular regime of conduct is to be observed, and systems of management for specified areas. The latter operate through specialised agencies, often enforceable by agreements based on the ordinary law of contract. These mechanisms are built on top of the common law of nuisance as already explained and in no way supersede it. We will now discuss these four mechanisms separately.

4. [1957] 1 All E.R. 894.

Licensing

The outstanding example of this mechanism is, of course, to be seen in the town and country planning legislation. However, one of the earliest controls using the licensing mechanism in the environmental field was s.112 of the Public Health Act 1875 (since replaced by s.107 of the Act of 1936). This required the licensing by the local authority of certain offensive trades such as blood boiling, gut scraping, rag and bone dealing. This was followed by the Alkali Works etc. Regulation Act 1906, which required the carrying out of any of a long list of scheduled processes (since extended under the Health and Safety at Work etc. Act 1974) to be registered annually with H.M. Alkali Inspectorate (now replaced by H.M. Pollution Inspectorate). Any such works must be carried out in such a manner as to use "the best practicable means" to ensure that no noxious gases or fumes are emitted into the atmosphere. This statute has proved to be of great importance in the prevention of chemical pollution, but did not have any effect on the emission of carbonaceous vapours from domestic chimneys. Also, by reason of the defence of "best practicable means", it has been ineffectual in preventing the escape of sulphur and nitrates from generating stations which are the most important constituents of the phenomenon known as "acid rain".

The whole system of town and country planning legislation is based on the licence for planning permission to carry out development coupled with the strict enforcement powers given to the local authority. It is a criminal offence to ignore the terms of an enforcement notice requiring compliance with conditions thus imposed in a planning permission, or requiring the demolition of a building erected without permission or stopping a use of land which has been changed from a previous use without permission.

The current Town and Country Planning Act of 1971, which has already been amended on many occasions, also elaborates separate codes. These provide for the licensing of alterations or demolition of listed buildings of architectural or historic interest, for the felling or other destruction of trees and woodlands that have been made the subject of special orders, and for the display of advertisements on land.

This last system of licensing is similar to the quite separate control contained in s.3 of the Control of Pollution Act 1974, under which a licence must be obtained from the county council for the deposit of waste on any land. Such a licence will be refused or issued subject to elaborate conditions the compliance with which will be closely monitored by the county council and subjected to criminal penalties in the event of a failure to comply with any of the conditions.

The discharge of trade effluents into the public sewerage system is subject to licensing administered by the water authority. Further, the consent of the water authority is necessary before a new discharge is made to a river, stream, estuarine or coastal waters under their control.

In all these cases, and indeed in relation to licensing systems generally, it will be a criminal offence to carry out the activity in question without first obtaining a licence and most frequently the statute will empower the licensing authority to

impose conditions in the licence, with which it will then normally be an offence to fail to comply. Monitoring due compliance with the terms of such a licence will normally be the duty of the licensing authority.

Special regimes

The concept of the special regime whereby a government agency, such as the Secretary of State, the Countryside Commission, the Nature Conservancy Council or a local authority, is empowered by Parliament to designate a defined area of land to be subject to specialised controls, is a common feature of modern conservation law.

Thus the Secretary of State may designate National Parks and Areas of Outstanding Natural Beauty which then become subject to stricter planning controls than those applying generally. Special authorities or combinations of local authorities are appointed to supervise the national parks, but in all these cases land ownership remains in private hands. The Minister of Agriculture may designate environmentally sensitive areas in which local farmers may be entitled to special grants to enable them to desist from certain farming activities that would harm the environment.

The Nature Conservancy Council or a local authority may designate nature reserves, and may in some cases acquire the land in a reserve and manage it so as to preserve the fauna and flora. Somewhat similarly the Nature Conservancy Council may designate land as being a site of special scientific interest (SSSI), and the landowner will then be entitled to compensation if he is refused permission to carry on some activity that would harm the nature of the land as an SSSI.

On a somewhat smaller scale, a local authority may declare land in an urban or rural area to be a conservation area, which again would subject the land to a tighter than normal planning regime.

Another example of a special regime is the making of a limestone pavement order by the Secretary of State under s.34 of the Wildlife and Countryside Act 1981. Also special controls may be imposed in respect of moorland areas under s.42 of the Act of 1981. Access to open country by members of the public may be secured by orders made under s.59 of the National Parks and Access to the Countryside Acts 1949.

For a somewhat different purpose, a local authority may declare an area to be a smoke control area, which will mean that within the area only "authorised fuels" (a term which includes gas and electricity) may be used for space-heating purposes. This device has been most effective in controlling the emission of carbonaceous vapours into the atmosphere, but it has had no effect on the emission of sulphur or nitrates. Somewhat similar are noise abatement zones, within which the noise level may not be exceeded without the consent of the local authority, who may also require these levels to be reduced. Other examples of a special regime are the measures designed for the regeneration of inner cities and depressed areas. These include the enterprise zones and special planning zones whereby would-be

developers can obtain some measure of freedom from normal planning controls and in some cases from local taxation. The urban development corporations are designed to secure the same objectives on a somewhat larger scale. The ordinary local authorities in the area are replaced by special corporations with wide powers and nominated, and funded, by central government. The first two urban developments corporations (Merseyside and London Dockland) are reported to have been reasonably successful, having been created in 1981, and now (1987) four more have recently been designated by the Secretary of State.

Management

The most general example of a management agreement is that contained in s.52 of the Town and Country Planning Act 1971, supplemented by s.33 of the local Government (Miscellaneous Provisions) Act 1982. Under this, a local planning authority may enter into an agreement with a prospective developer of land regulating the manner in which such development is to be carried out. These agreements are currently very popular and are sometimes used, but not always, to achieve environmental objectives. Such an agreement will be enforceable by the local authority against the developer in accordance with the usual principles of the law of contract, and in the case of the 1982 Act agreements against subsequent land owners.

Under s.39 of the Wildlife and Countryside Act 1981 a local authority may enter into a management agreement with the owner of land for the purpose of conserving or enhancing the natural beauty or amenity of the land or so as to promote its enjoyment by the public. Similar agreements may be entered into by the Nature Conservancy Council in respect of land within an SSSI.

The Minister of Agriculture may under s.18 of the Agriculture Act 1986 enter into an agreement with the owner of agricultural land within an "environmentally sensitive area" (ESA) providing that the owner shall refrain from specified sensitive activities that would harm the nature of the land as an ESA. In return the Minister would arrange for compensation to be paid to any such owner. Six areas have been designated as ESAs at the time of writing, 1987, although some 25 further areas are understood to be under consideration.

The management agreement in its various forms is a useful and subtle device enabling a government agency to monitor the day to day use of land in the interest of the environment. Private ownership of the land continues and an owner who is restricted in the activities he is permitted to pursue will often be entitled to compensation.

Criminal sanctions

Without the enforcement of the criminal law, a considerable portion of conservation law would be ineffectual. The penalties of the law, or the threat of such penalties, lies behind the licensing system already described.

The deposit of waste on land, the discharge of effluent into a stream, the failure

to observe the best practicable means to prevent the escape of noxious vapours into the atmosphere, in each case without the relevant consent or approval, or to fail to comply with conditions imposed in such a consent or approval, are all made offences by the relevant legislation. So is the failure to comply with the terms of an enforcement notice issued under the town and country planning legislation.

However, in addition there are many instances of specific offences, quite apart from the licensing systems. Thus it is an offence to deposit noxious or polluting matter into a river or stream, or to emit dark smoke into the atmosphere from a chimney of a dwelling-house or factory or from an open site. It is an offence to deposit litter in the open air where the public have access, or to burn cable in the open air.

The protection of fauna and flora depends almost entirely on the criminal law. Thus it is an offence to kill, take or maim a wild bird of a species listed in the Wildlife and Countryside Act 1981, or to disturb its habitat, subject only to the defence that the person responsible had been duly authorised by a licence from the Nature Conservancy Council, or was the owner of the land where the incident was committed. Similar provisions apply to the picking or destruction of wild plants, and to the killing of certain wild animals listed in the Act. Badgers and their setts are especially protected by the Badgers Act of 1974, as amended by the Act of 1981 (itself amended in this respect by the Act of 1985 of the same name) and deer are protected in some measure in the close season, by the Deer Act 1960. Salmon and certain freshwater fish are protected under the Salmon and Freshwater Fisheries Act 1975.

The criminal sanctions of the Wildlife and Countryside Act 1981 are unusually stringent. Not only may a convicted offender be fined by the court but the bird, animal or plant which was the subject of his offence may be confiscated. Further, if he is charged with the taking etc. of a number of birds or plants etc., the maximum fine will be assessed according to the number of items involved.

Rights of way

The protection and maintenance of rights of way and public rights of access to the countryside does not really fit into this fourfold classification of the statutory mechanisms of conservation law. These rights of the public are basically part of the common law right of any of Her Majesty's subjects to use the Queen's highway to pass and repass on their lawful occasions. Over the years, with the urbanisation of large areas of the countryside, the common law has had to be supplemented by elaborate procedures for the protection of footpaths and bridleways, for the creation of new public paths and long distance routes, and for the recording of existing rights of way. These provisions are now to be found in the Highways Act 1980, the National Parks and Access to the Countryside Act 1949, and Part IV of the Wildlife and Countryside Act 1981.

In addition access of the public to open country may be assured by an access agreement or order made under s.59 of the National Parks and Access to the Countryside Act 1949.

Conclusion

The enforcement and monitoring of these diverse provisions is the responsibility of a wide variety of agencies. General oversight is, or should be, provided by the Department of the Environment, and grants towards the cost of refraining from certain agricultural activities in the interests of the environment are made by the Ministry of Agriculture, Fisheries and Food. Local authorities are primarily responsible for the administration of the town and country planning legislation, the Clean Air Acts, and for the controls over the deposit of waste on land, although nuclear waste is the responsibility of the National Nuclear Industry Executive.

The Countryside Commission and the Nature Conservancy Council have a variety of supervisory and advisory functions and may in certain circumstances make grants for specific projects. There are also a wide variety of voluntary bodies and pressure groups concerned with the environment, such as the CPRE, the RSPB, and the several County Trusts for nature conservation. All of these monitor the operation of the existing law and from time to time agitate for its reform.

In recent years, many Directives affecting the environment have been made by the EEC and adopted by Member States. These have concerned the quality of drinking water, the cleansing of bathing beaches, standards for the emission of sulphur into the atmosphere and the emission of lead. The Directive requiring the preparation of an Environmental Impact Statement before a major project is undertaken, will come into force in July 1988. These Directives, when in force, have the effect of requiring the UK Government to bring our legislation into line with the provisions of each Directive. Regulations made by the EEC on the other hand have direct effect under the European Communities Act 1972.

In addition, there are a number of international treaties to which the United Kingdom is a party which are concerned with the environment. These treaties are not automatically part of the law of the United Kingdom, but they may have a considerable influence in suggesting improvements in legislation as indeed was the case with many of the provisions of the Wildlife and Countryside Act 1981.